BY MR. HOGUE:

Q Mr. Kilgore, how old are you, please?

A I am twenty-eight years old.

Q Where were you born?

A In Warren, Ohio.

Q Have you ever been a resident of Tampa, Florida?

A Just about all my life, yes, sir.

Q Were you a resident of Tampa, Florida, during the period of time, say, 1968 through 1975?

A Yes, sir, I was.

Q Alright, sir. I'll ask you now, do you know the Defendant in this case, Pedro Alvarez?

A Yes, sir, I do.

Q Do you see him in the Courtroom?

A Yes, sir, I do.

Q Would you point him out, please, and describe what he is wearing?

A He is wearing a brown suit, uh, blue shirt, medium hair. He is sitting next to the gentleman with the long hair and next to the blonde gentleman.

Q Thank you, sir.

If the Court please, may the record reflect that he's identified the Defendant, Pedro Alvarez?

THE COURT: It will so reflect.

BY MR. HOGUE:

Q Mr. Kilgore, do you recall the first time you met Pedro Alvarez?

A Yes, sir. I do.

Q Would you relate to the Jury what were the circumstances of that meeting?

A Yes, sir. It was in '68.

MR. LEVINE: Excuse me a second. I would like to ask if we could get a time first, see whether or not it is within the framework of the indictment.

THE COURT: I thought that was part of the question.

MR. LEVINE: He asked the circumstances - -

THE COURT: When was it, Mr. Kilgore?

THE WITNESS: It was in '68 or '69.

BY MR. HOGUE:

Q Alright, sir. Where did that meeting take place?

MR. LEVINE: Your Honor, please, I object, it is irrelevant and immaterial. It is beyond the scope of the indictment. Charged with an incident that occurred January, '72 to June of '72.

THE COURT: Well, at this point, I cannot tell. I'll reserve ruling on it. I'll take the answer, however, it could be irrelevant as to the first question that he had to meet with Mr. Alvarez.

Go ahead.

BY MR. HOGUE:

Q Go ahead, sir. Where did the initial meeting with Mr. Alvarez take place?

A At the Outlaw Pawn Shop on Dale Mabry.

Q Who introduced to you this gentleman, the Defendant, Mr. Alvarez?

A A guy by the name of Mike Hearst.

Q Did there come a time after this initial meeting with Mr. Alvarez that you became friends with him?

A Yes, sir, we did become friends.

Q Alright. Sir, what association, if any, did you have with Mr. Alvarez once you all met?

MR. LEVINE: To which I object, it is irrelevant and immaterial what the relationship may have been prior to January 1, 1972.

He has identified him, he says he knows him, and any information that interim period is is irrelevant and immaterial to this issue.

THE COURT: I'll overrule the objection.

I will, of course, instruct the Jury that the allegation of the indictment is that the conspiracy charged existed

from on or about January, 1972 until June of the same year, which is the issue in the case. However, the relationship, if any, which the witness might testify to between hmself and any Defendant on trial could be relevant with respect to the state of mind, or behaviour of the subject in explaining whatever he says explains the subsequently of himself or the Defendant.

BY MR. HOGUE:

Q Alright, sir. Would you please tell the Jury in what manner you became associated with Mr. Alvarez?

A We used to trade guns for dope and –

MR. LEVINE: Your Honor please –

THE COURT: We would go –

MR. LEVINE: Your Honor please, I move for a mistrial.

MR. GRABER: Your Honor, I join in that motion.

THE COURT: Alright.

MR. LEVINE: May we be heard?

THE COURT: Come to side bar.

(Thereupon, the following side bar discussion was had between Court and counsel.)

MR. LEVINE: Your Honor please, the Defendant, Alvarez specifically moves for a mistrial as it relates to the evidence that has now been presented before the Jury. The prosecutor well knew from the testimony given in the Geders case, which we all have, that this testimony was going to come in. He was not unaware of it. Specifically, asked questions that went to it and directed its impact and import thereto. It is not relevant or germane to the controversy for which we are charged. It is too far away in point of time. It is only prejudicial. It brings my client's character into issue, and we haven't put his character into issue as yet. It attempts to establish a a crime that my client committed that may be a State and Federal offense for which he has never been charged. It

is – it has no probative value whatsoever particularly in light of the point in time.

THE COURT: Did you anticipate that response from the witness, Mr. Hogue?

MR. HOGUE: Sir?

THE COURT: Did you anticipate that response from the witness?

MR. HOGUE: The response about the marijuana? Yes, sir, I did.

THE COURT: Well, he said, "Dope."

MR. HOGUE: Yes, sir.

No, I don't deny – the Government does not deny he knew that is what he was going to say.

MR. LEVINE: Judge –

THE COURT: Well –

MR. ROSE: We submit it is material to show his relationship with Mr. Alvarez at a later time, his continued association in drug trafficking with Mr. Alvarez, whether it is relative to the beginning of this particular conspiracy we are not necessarily concerned with and wouldn't object to limiting, but shows relationship with Mr. Alvarez from when he met him, how he became associated with, shows his relationship during the conspiracy.

MR. GRABER: Your Honor, I submit this shows -- the only purpose is to show propensity to commit a crime, and I submit to Your Honor that the Supreme Court, if Mr. Alvarez took the stand would have said, "If that is the purpose, you can't even ask him about that." What they are doing is the reverse, taking the witness to show that which they couldn't ask Mr. Alvarez from the stand. I submit further, Your Honor, Mr. Massler has been prejudiced by this just on the spill over effect. Here we have testimony now -- you have a situation of a prior crime in which my client is charged along with Mr. Alvarez, and

I submit to Your Honor that there is no way at this point that Mr. Massler can obtain a fair hearing.

MR. CAMPBELL: I submit the same thing for Mr. Rice.

MR. LEVINSON: Judge, if I could comment on behalf of Mr. Wells, I would join in Mr. Levine's motion and additionally ask for severance of Mr. Wells from the trial of Mr. Alvarez based on the fact that the evidence now before the Jury is that Mr. Alvarez so prejudices my client, has no probative value as relates to my client to - - prohibitive from having a fair and equal trial in this - -

MR. LEVINE: Judge, could we deal with this maybe out of the presence of the Jury? I submit it is really a meaningful and significant issue particularly with Government's admission that they knew it was coming. It is interesting that they didn't present this kind of issue for a prior determination by the Court, but they ran full steam right ahead into it intending - - intending the result. As a matter-of-fact, it is really unfair even to grant a mistrial although I've asked for it because of the fact that my client has now been put to the problem of paying for the attorney being here a day, all preparatory work in connection therewith, uh, I wonder if they have some authority knowing they were going to do this? I read the transcript. I couldn't conceive that they would. If they had some authority they - - that would support their contention here - -

MR. CAMPBELL: My client has not even been identified in this case, Your Honor, but yet he is charged now with the spill over of some crime that took place years before.

MR. HOGUE: Your Honor, the Government would respond to all these remarks by fellow counsel that Mr. Kilgore is charged as a - - the testimony will show, we

proffer that Mr. Kilgore was a co-conspirator with these other Defendants, specifically that he worked for the Defendant Alvarez and that they worked together for the purpose of importing marijuana and distributing marijuana within this country, that they became associated together prior to January of 1972 and that their association included the fact that marijuana, uh, that they had marijuana dealings together - -

THE COURT: Well, just a minute. The word used by the witness in his answer which provoked these motions was, "dope". Now are you in a position to maker a proffer as to what he means by the word, "dope"?

MR. HOGUE: I believe I am, yes, sir. The Government proffers that he means marijuana, and I can say in good faith I think that is all he means is marijuana.

THE COURT: To the exclusion of any other controlled substance?

MR. HOGUE: Yes, sir. I can make that proffer in good faith, Your Honor. We would have no objection to the Jury being removed and further inquiry by us being made into what he means by, "dope".

THE COURT: Alright. Let me have the Jury withdrawn.

(Side bar discussion concluded.)

THE COURT: Ladies and gentlemen of the Jury, the matter before the Court requires further discussion with counsel, and for your convenience and for ours, I am going to ask you at this time if you would please withdraw to the Jury room, and I will send for you as soon as we are ready to proceed in your presence in this case. I do ask now that you retire to the Jury room, please.

(Thereupon, the Jury was taken from the Courtroom.)

THE COURT: Mr. Hogue, continue that examination of the witness to clarify the question last discussed at side bar.

BY MR. HOGUE:

Q Mr. Kilgore, you mentioned that you traded guns to Mr. Alvarez for dope. Would you explain to his Honor what you mean when you say, "dope."

A I mean marijuana.

Q Alright, sir. Now, are you referring to any other drugs of any kind?

A Hashhish. We traded for pot and hashhish.

Q Now, hashhish, what is that?

A It is like a condensed version of pot.

Q Now, pot, uh, for the record is marijuana?

A Yes, sir.

MR. HOGUE: Your Honor, should I inquire further on that point?

THE COURT: No. That is unnecessary.

MR. LEVINE: Judge, could we be advised as to the theory upon which they seek to offer this? Is this supposed to be a prior similar transaction? I mean, what is – so that I know how to address myself in terms of factual argument, is that the Government's theory?

THE COURT: Alright. What is your response to that question, Mr. Hogue?

MR. ROSE: Your Honor, if I might respond to that. Our response is simply this: That on January 1, that Mr. Kilgore just didn't appear out of thin air and start to work for Mr. Alvarez, he did something for him prior to January 1, 1972, and this witness' testimony is just a lead in to show his association with Mr. Alvarez in the past.

MR. LEVINE: Judge, could we have the witness removed while we argue the legal issue, if we might?

THE COURT: Alright.

Mr. Kilgore, step down and retire from the Courtroom momentarily, please, while I consider this matter with counsel.

(Thereupon, the witness was removed from the Court-

room.)

THE COURT: Pardon me for a minute, Mr. Levine.

I have not specifically been requested by any counsel to invoke the Rule though that was more-or-less implicit in some of our prior discussions. Are there any witnesses present? Anybody desire to invoke the rule in this case?

MR. ROSE: Government would invoke the rule, Your Honor, with the exception of Mr. Jahnke.

THE COURT: Alright.

MR. CAMPBELL: Yes, we would, Your Honor.

THE COURT: The rule has been invoked.

It will be necessary, of course, for all persons having any reason to believe they may be called as witnesses in this case by any party to withdraw and remain outside the Courtroom at all times during these proceedings unless and until they are called in as a witness. And witnesses while waiting to testify are admonished not to discuss the case in any manner among themselves. The rule of sequestration, of course, will exclude the parties to the case and Mr. Jahnke, whom I previously ruled would be permitted at counsel table for the Government.

I will, of course, rely upon counsel to see that the rule is observed.

Now, go ahead, Mr. Levine.

MR. LEVINE: Judge, it doesn't even appear that the Government's theory is, of prior similar transaction. I've asked for Your Honor to have them articulated, and they have declined to do that.

One of the reasons why I asked the witness to step out was from the testimony he gave in the Geders and Fink case, his testimony is substantially the same. I'd submit to Your Honor they have no proof of importation of this dope, no proof of importation of it and, therefore, it would not be a Federal offense, and accordingly would not be a prior similar transaction. So we then go to the only other

theory that they contend for and that is to show that he has some relationship with Pedro Alvarez. And what did they have the witness testify to without cautioning him? They had him testify to dope. He has now described that as two different things, one hash hish and marijuana.

Number two, he has also testified that there was an exchange of guns for that dope, which would be another Federal criminal offense because of the failure to appropriately transfer or register the guns and go through the Federal formalities in that regard. It is just inconceivable that the Government would take this kind of an attack.

They established he knew Alvarez. He identified him -- although with a blue shirt, he sits there with a white shirt, but otherwise identified him, and they had any number of things that they could have asked about how he is able to identify him, whether he knew him in the community, but they go to a specific criminal act that has a point in time of at least four years or approximately four years prior to the incident we are concerned with.

The thing - - the man talks about conspiracy. Conspiracy to import marijuana. They are saying they want to show they had some criminal relationship before. Paint my client with a black picture before this Jury, attack his character before he has even had a chance to take the witness stand and say it doesn't mean anything. It is just to show that these two people have some contact together.

Judge, I didn't come prepared to argue this specific legal issue, uh, not knowing that the Government would take this approach and, therefore, I am left without any law to cite to Your Honor at this particular juncture but I would certainly like the opportunity to do that. I think that the -- in fairness to the Court and certainly, at least, to the Court if not to the defense counsel, knowing that

how they were going to proceed you would have expected a memorandum or something from the Government counsel that would raise the issue either in advance of trial, or at the outset of the trial so that we could have appropriately dealt with it. Here everybody is caught, and now I have to ask for a brief adjournment, it is coming on towards lunch time, maybe to deal with a particular issue, you know, predicated upon some cases.

(Pause.)

THE COURT: Well, let me put this in some context. Make a proffer, Mr. Hogue, as to what you expect to further adduce from the witness with respect to his relationship with the Defendant, Alvarez, up to January of 1972, which is the date of commencement of the conspiracy as alleged in this case.

MR. HOGUE: Your Honor -- alright, sir, Your Honor. We will submit -- we will proffer, rather, that the evidence will show that as a result of this early association, beginning possibly in 1968, or 1969, in March, that the coconspirators, we submit, Mr. Alvarez and that witness, became so involved that at the time of the, uh, beginning of the conspiracy that the Grand Jury charges that Mr. Alvarez was so confident of Mr. Kilgore's abilities that he hired him as one of his right-hand men, and the evidence will further show, with proffer, that he acted for Mr. Alvarez as a guard of a large quantity of marijuana, and further that he was entrusted in collecting moneys from certain buyers in the Tampa area and that he collected large amounts of money, and that he -- which were subsequently turned over to Mr. Alvarez, and that he was paid for his services rendered, and he will proffer -- we'd submit, that he will testify that he was an employee of Mr. Alvarez.

MR. LEVINE: Judge, if I may, that is one of the problems of a proffer from counsel, they don't always neces-

sarily come up to what the witness says. But I submit if we take what Mr. Hogue says, he hasn't even suggested that there was any continuity in the criminal relationship in dealing in marijuana. I would submit to Your Honor that his testimony about collection of money and payment as an employee all comes After January 1, 1972. He hasn't even suggested to you in his proffer that this man ever acted as an employee, collector, distributor, or armed guard of marijuana prior to January 1, 1972. And I assume Mr. Hogue being a knowledgable prosecutor that he presented his proffer in a light most favorable to him, and he doesn't have anything. He has got a singular transaction where this man bought in exchange for guns marijuana, or dope from my client. He doesn't even suggest that there is a continuity in that relationship, or there was anything that was a part of the conspiracy that spills over to the prior relationship.

Now if as a matter-of-fact, Kilgore had been involved in an importation with my client at an earlier period of time, then there may well be some similar transaction, some showing of relationship. He doesn't even suggest that. And I was going to object to him making the proffer and have the witness say it, but even if we take his words, there is no continuity there at all even this kind of singular relationship of buying and selling marijuana in that context.

He doesn't talk about being an employee and collecting money. I'd submit to Your Honor that if Mr. Hogue were called upon to respond directly as to the period of time involved, he would have to tell Your Honor, candidly, that is the period of time involved in the conspiracy. Not during any prior period. So that is what we are dealing with here. We are dealing with a totally different relationship between these people in a light - - presented in a light most favorable from this witness.

There was a relationship that he was a user and buyer of marijuana, not knowing where it came from, whether Alvarez grew it in his back yard or where it came from, and then all of a sudden a totally different relationship, according to the proffer, that existed and started and ended in about January of 1972. That doesn't give him a right to bring in the totally unrelated different relationship that existed prior thereto, particularly in the context of the significant prejudicial effects particularly in the language of this witness. Who could ever forget those words?

THE COURT: Alright. Do I understand that each of the other Defendants have likewise moved for a mistrial, or in the alternative for severance?

MR. GRABER: That is correct.

MR. CAMPBELL: That is correct.

MR. LEVINSON: Your Honor, the Defendant, Wells, has done both.

THE COURT: Pardon?

MR. LEVINSON: We've moved for a mistrial and severance.

MR. CAMPBELL: Same thing.

THE COURT: That is what I asked, Mr. Levinson.

MR. LEVINSON: Yes, sir. I just wanted to make it clear that I don't know that it is an alternative position on our part.

MR. GRABER: If Your Honor please, I perhaps did not so state at the time I made my motion, but I would ask for a mistrial and severance in this matter, and that was my intent.

THE COURT: Alright. My principal concern with respect to the response of the witness as manifested by the discussion at side bar was the witness' use of the term, "dope", which is obviously to me at least and to my knowledge an ambiguous term which would usually be as-

sociated more with, perhaps, heroin, or other controlled substances than with marijuana.

It is my understanding, however, that the witness will clarify that remark to say that he is referring to marijuana transactions with the Defendant, Alvarez, that he said that he had at or subsequent to 1968.

As a consequence it seems to me particularly given the nature of opening statements of all counsel at this early stage of the proceeding that the testimony is admissable under Rule 404-B of the Rules of Evidence with respect to the Defendant, Alvarez. Obviously not at this point admissible insofar as the other Defendants are concerned, and the Jury, of course, will be so instructed with the usual so called, "Apollo" instruction in that respect, but subsequent to those comments the motions for mistrial and the motions for severance of each Defendant are denied.

Marshall, return the witness to the stand and as soon as that is done seat the Jury.

(Thereupon, the witness was seated.)

(Thereupon, the Jury was returned to the Courtroom.)

THE COURT: Thank you. Be seated, ladies and gentlemen.

Now the last answer given by Mr. Kilgore to counsel's question before my conference with counsel and my request that you retire to the Jury room of course should be received and considered by you only with respect to the Defendant, Mr. Alvarez, at this point in time and, of course, is entitled to receive only such weight as you may think it entitled to receive in relation to all of the other testimony and evidence to be adduced before you in the trial of this case.

In addition to those comments, however, there is certain instruction that I wish to give you that would apply to that as well as subsequent testimony and evidence

that will no doubt be received during the trial of this case, and it has to do with the nature of the offense alleged in the indictment. As you know and have been told repeatedly, the offense alleged is one of conspiracy to violate certain laws of the United States. Now a conspiracy under the law is a combination or agreement of two or more persons to join together to attempt to accomplish the same unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or to disregard the law.

I will, of course, give you additional instructions at the end of the trial concerning the law of the conspiracy, but there are some principals as I have mentioned which you should know at this time concerning your consideration of the testimony and evidence presented during the trial.

With respect to the conspiracy offense that was alleged in the indictment, you should first determine from all of the testimony and evidence in the case to be adduced before you whether or not the conspiracy existed as charged in the indictment. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the particular Defendant then under consideration willfully became a member of such conspiracy at or about the times alleged in the indictment.

In determining, however, whether a particular Defendant was a member of an alleged conspiracy, if any, the Jury should consider only that evidence, if any, pertaining to his own acts and statements. He cannot be bound by the acts or statements of other alleged participants until it is established beyond reasonable doubt, first, that a conspiracy in fact existed as alleged in the indictment and, second, from evidence of his own acts and statements that the Defendant under consideration

was one of its members.

So until that has been determined that a conspiracy existed and that the Defendant under consideration was one of its members, evidence of any statement made, or act done by another person may not be considered as evidence against the Defendant under consideration who is not present and did not hear the statement made, or see the act done.

On the other hand, if and when it does appear if it should so appear beyond a reasonable doubt from all of the evidence in the case that a conspiracy did exist as charged and that the Defendant under consideration was one of its members, then and only then the statements and acts thereafter knowingly made and done during such conspiracy and in furtherance of its objects by any other proven member of the conspiracy may be considered by the Jury as evidence against the Defendant under consideration even though he was not present to hear the statements made, or see the acts done.

This is true because as stated earlier a conspiracy is a kind of partnership so that under the law each member is an agent or partner of every other member, and each member is bound by, or responsible for the act and statements of every other member when made in pursuance of their unlawful scheme and during its continuation.

Now, Mr. Hogue, you may continue with your examination of this witness.

MR. HOGUE: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUING

BY MR. HOGUE:

Q Mr. Kilgore, you had testified that you and Mr. Alvarez traded guns for dope. Would you tell the Jury what you mean by, "dope"?

A By, "dope", I meant that we traded for marijuana and hashhish.

Q Alright.

A I had the guns and he had the marijuana and hashhish, and I would trade him the guns for that.